so the existence of the relation of passenger and carrier, is commonly to be implied from circumstances." Mr. Hutchinson in his work on Carriers (2d ed. sec. 562) after adverting to the fact that mere intention to become a passenger does not suffice, states the rule thus, "But if the intention and the act of the party combined are such as to give rise to an implied contract to carry, the duty and obligation of the carrier as such at once begin." This is merely a different way of stating the rule as laid down in the *Webster* case (*supra*), for to imply a contract in fact is to assume from the facts that the carrier had accepted the passenger.

In Kentucky a statute provides that all railroad companies shall open their ticket offices and waiting-rooms for the passengers at least thirty minutes before the schedule time for the departure of trains. A recent case in that jurisdiction decides that an acceptance will not be presumed before that time, and that where a person is injured by third parties in the depot three hours before train time the carrier is not liable, *Ill. Cent. R. Co.* v. *Laloge* (Ky., 1902) 69 S. W. 795. The same result was reached in *Phillips* v. *Southern R. Co.* (1899) 124 N. C. 123, where a rule of the company required its waiting-rooms at a station to be closed until thirty minutes before the departure of the next train.

In the principal case the facts justify the conclusion reached by the court that the wife was a passenger. Her right to recover was therefore well recognized. And since this extraordinary duty of protection against third persons, has been imposed only in favor of passengers, or at least those who have lawful business with the carrier as such—see *Daniel* v. *R. Co.* (1895) 117 N. C. 592—the further conclusion that the husband could not recover, must also be considered warranted.

AN AGENT'S LIABILITY IN TORT TO THIRD PERSONS FOR NONFEASANCE.—The case of *Lough* v. *Davis* (Wash. 1902) 70 Pac. 491, raises the question whether the nonfeasance of an agent toward his principal may also be such a nonfeasance toward a third person damaged thereby as to make him liable in tort to that third person. The ordinary rule that runs through the books seems to answer in the negative. It is said that an agent is liable in tort to third persons for misfeasance but not for nonfeasance. COKE, as counsel, suggested the distinction in *Marsh* v. *Astry* (1590) Cro. Eliz. 175, in a case where an under-sheriff failed to return a writ, but the court did not pass on its validity. Lord HOLT'S dictum in *Lane* v. *Cotton* (1701) 12 Mod. 472, 488, that a post office clerk would not be liable to a third person for failure to act, or nonfeasance, but would be for an improper act, or misfeasance, is the origin of the rule. The natural implication of this is that while a clerk would be liable if he lost a letter by carelessly knocking it into a waste box, he would not be if the wind blew it there and he failed to take the trouble to pick it out. Lord MANSFIELD in *Whitfield* v. *Lord Le Despencer* (1778) 2 Cowp. 754, 765, speaks of the responsibility of the clerk for the loss of letters without drawing any distinction between misfeasance and nonfeasance. It was Justice STORY'S repetition of Lord HOLT'S statement of the law that seems to have given it its wide currency. Story on Agency

§ 308. Possibly what its authors had in mind in their enunciation of the rule was merely that third persons do not get a right of action through an agent's violation of a duty owed solely to his principal. So limited, it would be perfectly sound, and it is to this class of cases that it has ordinarily been applied. *Hill* v. *Caverly* (1838) 7 N. H. 215; *Calvin* v. *Holbrook* (1848) 2 N. Y. 126. The natural implication, however, is that no failure by an agent to act, which is a nonfeasance as to his principal, can render the agent liable to a third person. There is no careful analysis of the meaning of the rule in those cases that adopt it, but they seem to accept this interpretation of it and assume it to be the law, without much attempt to justify it.

On principle, it seems that the rule so interpreted cannot be justified. If one owes a duty to a third person to act, there is nothing in the collateral fact that he is an agent, to relieve him from liability to that third person from damage which his act would have averted. Nor on the ordinary principles of torts is there any difficulty in finding that one who is an agent may be under a duty not merely to his principal but also to a third person to do a certain act. It is true that one is not ordinarily bound to act to prevent damage to another, even though one might prevent it without risk or serious effort. Presumably one can stand by and watch a man be struck by a passing train, though a warning word would save him. On the other hand, if a person once does an act, and that act, though innocent in itself, so alters circumstances that it makes the safety of others dependent on his doing some further act, then his freedom to stand by is lost. He neglects the second act at his peril, and if damage follows, is liable in tort for his nonfeasance. Applying these principles to the case of an agent, it would seem that whenever in the course of his employment he creates a condition not dangerous at the time, but that will be dangerous unless he does some further act, he thereby puts himself under a duty to third persons to do that act, and that duty is no way affected by the fact that he is also under a duty to his principal to do the same act.

Further, if an agent undertake to perform a duty owed by his principal to third persons, knowing that in so entering on the employment and assuming control he is making the safety of such third perons dependent on his acting, he would seem, on the same principles, to owe them a duty to act. A railroad gateman would undoubtedly be liable to a person injured by his lowering the gates improperly. Would he not be liable to one injured by his failing to lower them at all? So where an agent undertakes to make repairs and performs the work so carelessly that some one is injured he is personally liable. Should a like result be reached where he has assumed the task of keeping premises in repair but fails to do so? In the ordinary case his undertaking is merely by virtue of his contract with the owner and there is no duty owed to third persons. But if it also appears that the agent is in absolute and exclusive control of the premises, if, in other words, he has undertaken to act as owner of the premises, then, the principal case decides, he is under a common law duty—quite irrespective of his contract with his principal, to keep the premises under his control in a safe condition. On principle the inquiry in every case should be whether the agent by his previous conduct had

so altered circumstances that he was under a duty to the plaintiff to do an act which would have averted the damage sustained. That he has also failed in a duty to his principal should be held immaterial. *Osborne* v. *Morgan* (1881) 130 Mass. 102.

As to authority, Lord HOLT's rule has been stated repeatedly to be the law, but, as has been pointed out, it has usually been applied to cases where it might fairly be said that the duty to act was owed solely to the principal. There are, however, cases in a number of jurisdictions which refused recovery where on the principles stated above it was a fair question whether the agent was not under a duty to the plaintiff as well as to his principal. *Van Antwerp* v. *Linton* (1895) 89 Hun. 417; *Murray* v. *Usher* (1889) 117 N. Y. 542 (*dictum*); *Dean* v. *Brock* (1894) 11 Ind. App. 507; *Feltus* v. *Swan* (1884) 62 Miss. 415; *Carey* v. *Rochereau* (1883) 16 Fed. 87; *Drake* v. *Hogan* (Tenn. 1902) 67 S. W. 470.

On the other hand, where, on the ordinary principles of torts, the facts have clearly shown a duty to the third person injured, particularly where some positive act in the course of his employment has imposed the duty to do the further act, the courts in a number of jurisdictions have found a way to allow recovery. They have evaded the rule by broadening the definition of misfeasance. *Horner* v. *Lawrence* (1874) 37 N. J. L. 46; *Lottman* v. *Barnett* (1876) 62 Mo. 159; *Ellis* v. *McNaughton* (1889) 76 Mich. 237; or have ignored it, *Campbell* v. *Portland Sugar Co.* (1873) 62 Me. 552; or have denied its validity, *Mayer* v. *Bldg. Co.* (1894) 104 Ala. 611. In the New Jersey case an agent's omission to put up the bars of a fence properly taken down, in the Michigan case his failure to relay a walk taken up by another, were held to be misfeasance. A definition of misfeasance that would include these cases would seem to eliminate the term nonfeasance from the law of torts, or at any rate prevent its being used in contra-distinction to misfeasance. The better course seems to be taken by the Alabama court and the principal case in holding squarely that an agent's failure to act may be a nonfeasance both as to the principal and as to a third person injured thereby, and that if it is, the fact of agency cannot prevent the third person from recovery.

In holding that an agent in complete control of premises is under a duty to keep them safe, the principal case is supported by *Baird* v. *Shipman* (1890) 132 Ill. 16; *Campbell* v. *Sugar Co.*, *supra*, and is thought by Huffcut, "Agency," § 212, to be "more consonant with sound principles" than those cases which take the other view. That such a duty does not exist in every case where an agent has the management of premises is, however, well pointed out in *Kuhnert* v. *Angell* (1900) 10 N. Dak. 59. The agent's control must be complete, and he must stand towards third parties in the position usually occupied by the owner of thepremises.